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612503—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 474

PETE JONES, PETITIONER

v.

JAMES H. PATTERSON, UNITED STATES MARSHAL FOR THE TERRITORY OF ALASKA, THIRD DIVISION, AND OSCAR OLSON, DEPUTY UNITED STATES MARSHAL FOR THE TERRITORY OF ALASKA, THIRD DIVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals denying petitioner's motion to dismiss the appeal (R. 70–76) is reported at 141 F. (2d) 319. The court's opinion on the merits (R. 78–83) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 22, 1944 (R. 84). The petition

for a writ of certiorari was filed September 16, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the application for allowance of an appeal to the circuit court of appeals was "duly made" within three months after entry of the judgment of the district court.

2. Whether the circuit court of appeals erred in denying the motion to dismiss the appeal on the ground of laches.

STATUTE INVOLVED

Section 8 (c) of the Act of February 13, 1925, as amended (28 U. S. C. 230), provides:

> No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

STATEMENT

On October 17, 1942, petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Territory of Alaska, Third Division, alleging that he was illegally restrained of his liberty under a judgment sentencing him to imprisonment for six months, entered against him on October 15, 1942, in the United

States Commissioner's Court of the Precinct of Anchorage, Alaska, Third Division; that the judgment was based upon his conviction for the crime of maintaining a gambling place contrary to Section 3, Chapter 56, of the Session Laws of Alaska, 1919 (Sec. 4985, Compiled Laws of Alaska, 1933); and that that statute was void as having been passed by the legislature of the Territory of Alaska in violation of Section 9 of the 1912 Organic Act of Alaska (37 Stat. 512, 514–515) (R. 2–4). A writ of habeas corpus issued (R. 4–6) and respondents filed a return thereto which denied the allegations of the petition and recited that petitioner had been confined under the judgment of the United States Commissioner's Court from October 15 to October 17, 1942, having on the latter date been released on bail pending a hearing on the writ of habeas corpus (R. 9–11; see also R. 5, 6–7). Petitioner filed a demurrer to the return (R. 13) and a hearing thereon was held on October 27, 1942 (R. 11–12).

The district court subsequently sustained the demurrer (R. 12) and filed findings of fact and conclusions of law (R. 14–17) in which it concluded that Section 3, Chapter 56, of the Session Laws of Alaska, 1919, was void as interfering with or attempting to limit an act of Congress to prevent and punish gambling, in violation of Section 9 of the Organic Act of Alaska. The court accordingly entered judgment exonerating peti-

tioner's bail and ordering that petitioner be discharged (R. 17–18). Respondents appealed, and petitioner moved to dismiss the appeal on the grounds that respondents' application to appeal was not timely made (R. 72) and that respondents had been guilty of laches in prosecuting their appeal (R. 65, 76). The circuit court of appeals filed an opinion denying the motion (R. 70–76) and later rendered a separate opinion on the merits reversing the judgment of the district court (R. 78–83).

Petitioner urges as one of the grounds of his petition for a writ of certiorari that the appeal to the circuit court of appeals was not taken in time. The relevant facts in respect of this question may be summarized as follows:

The judgment of the district court, rendered by Judge Hellenthal of the third division, was entered on November 5, 1942 (R. 17–18). The petition for allowance of appeal, together with the necessary accompanying papers, was filed with the clerk of the district court, third division, at Anchorage, Alaska, on January 29, 1943, within a period of three months from the date of the judgment. Service of copies of these papers was made on petitioner's counsel on January 28, 1943. (R. 18–23, 27, 30–31.) Finding that Judge Hellenthal was absent from Anchorage, the United States Attorney on January 29 unsuccessfully attempted to send the papers by plane for presentation to Judge Hellenthal at Juneau, Alaska (R.

25–26, 27–28, 31–32). The papers, together with a showing that Judge Hellenthal was absent from the third division (R. 41–42), were subsequently submitted to Judge Pratt, judge for the fourth division of the district court, at Fairbanks, Alaska (R. 28, 32–33, 40). On February 2, 1943, Judge Pratt entered an order referring the matter back to the third division on the ground that Section 8 (c) of the Act of February 13, 1925, *supra,* had been complied with and there was therefore no necessity for him to act on the petition for allowance of appeal (R. 41–42). The appeal papers were then returned to, and a copy of Judge Pratt's order was filed with, the clerk of the third division (R. 29, 40). Judge Hellenthal, who returned to the third division on February 21, 1943 (R. 33), which was subsequent to the expiration of the appeal period, formally allowed the appeal on April 13, 1943 (R. 38–39), after the matter had been brought to his attention several times previously (R. 25, 29, 34, 36–37).

ARGUMENT

1. Petitioner does not here challenge the validity of his conviction.[1] Rather, relying on the rule of *Matton Steamboat Co.* v. *Murphy,* 319 U. S. 412, he contends (Pet. 7–19) that the appeal to the

[1] Hence, we do not discuss that question. If the question were open, we think that the opinion of the circuit court of appeals (R. 78–83) amply demonstrates that petitioner's conviction was not invalid.

circuit court of appeals, which was governed by Section 8 (c) of the Act of February 13, 1925 (*supra,* p. 2),[2] was not taken in time because the application for allowance of the appeal was not presented to the judge who signed it within three months after entry of the judgment of the district court. However, a timely application for allowance of the appeal was made to the district court, as distinguished from a judge thereof; petitioner's contention is therefore without merit.

Regardless of any doubts which may have previously existed (cf. *Von Holt* v. *Carter*, 56 F. (2d) 61 (C. C. A. 9); *Baez* v. *People of Puerto Rico,* 82 F. (2d) 317 (C. C. A. 1)),[3] it is now settled that an appeal to the circuit court of appeals under Section 8 (c) may be allowed by either the

[2] In Paragraph 2 of the note to Rule 1 of the Federal Rules of Civil Procedure, which authorize the taking of an appeal in a habeas corpus proceeding by filing a notice of appeal (see Rules 73 (a) and 81), the Advisory Committee states that the Rules do not extend to the District Court for the Territory of Alaska. Cf. 48 U. S. C. 646 and 873a, in which Congress made the Rules applicable to the District Courts of the United States for Hawaii and Puerto Rico. There is no similar enactment with reference to Alaska.

[3] In the light of the *Steffler* decision, cited in the text, the dictum in the earlier *Baez* case, *supra*, upon which petitioner relies (Pet. 8–9, 10–13), that the timely filing of an application for allowance of an appeal in the office of the clerk of court is not an application "duly made" within the meaning of Section 8 (c) of the Act of February 13, 1925, is an inaccurate statement of the law in respect of those cases where the application is made to the court by filing it with the clerk of that court.

district court or a district judge and that when application is made to the court, it is timely if it is filed with the clerk of the court within three months after entry of the judgment of the district court. *Steffler* v. *United States,* 319 U. S. 38, 40. It is equally well settled that if application to the court or to a judge is made in time, it is immaterial that the order allowing the appeal was not signed within the appeal period, for otherwise "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control." *Reconstruction Finance Corp.* v. *Prudence,* 311 U. S. 579, 582; see also *Matton Steamboat Co.* v. *Murphy, supra.*

Tested by these principles, it is not open to doubt that the appeal in this case was taken in time. The application for appeal, together with the accompanying papers, was directed to the court (see R. 19–20), it was filed with the clerk of the court on January 29, 1943, within the appeal period, and it was thereafter allowed by the court, through Judge Hellenthal (see *supra,* pp. 4–5). Since the application was appropriately made to the court, the rule of the *Matton Steamboat* case that timely application must be made to the judge who allows the appeal is not here apposite. Rather, to adapt that rule to the situation where application is made to the court, it is plain that if, as in this case, timely application is made to

the court which allows the appeal, it has been "duly made" within the meaning of Section 8 (c) of the Act of 1925.

2. Petitioner also urges (Pet. 19–35) that the court below erred in refusing to dismiss the appeal on the ground of laches by respondents in filing the record and docketing the cause in that court. Since, however, the record was filed and the cause docketed within the time fixed by order of the court below, it is clear that petitioner's contention is without substance.

The appeal was allowed on April 13, 1943 (R. 38–39), and the citation was issued on April 29 (R. 43–45). Thereafter, upon appropriate applications, the district court and Judges Wilbur and Garrecht of the circuit court of appeals extended for approximately ninety days the time for filing the record and docketing the cause (R. 45–46, 47–49, 52–53, 57–58). The record was filed before the expiration of the last extension (R. 58). It shows no facts indicating purposeful dilatoriness on the part of respondents in seeking these extensions and several of the orders extending the time for filing and docketing recite that they were made for good cause shown. In these circumstances, petitioner having failed to show any substantial prejudice by the extensions, we submit that the court below properly denied the motion to dismiss the appeal on the ground of laches.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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